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CONSUMER LAW

Ronald L. Hersbergen*

AUTOMOBILE REPAIR

By far, the number one category of consumer complaints nationwide is automobiles and automobile repairs. A survey of 73 state and local consumer offices by the President's Office of Consumer Affairs indicated that automobiles were most frequently listed among the top ten types of consumer complaints received.¹ The Louisiana Governor's Office of Consumer Protection also lists automobile repair as the most frequently complained-of consumer transaction.² The facts of *West Esplanade Shell Service, Inc. v. Breithoff*,³ a Fourth Circuit Court of Appeal decision, highlight the need for reform in the automobile repair industry. Defendant brought his five-year-old automobile to plaintiff's service station to have it repaired. According to his version of the facts, defendant was mainly concerned with the auto's excessive consumption of oil and its emission of smoke. He claimed that plaintiff had told him that a "valve job" costing about \$150 would remedy the oil and smoke problem. The plaintiff, on the other hand, testified that defendant had requested that a compression test be performed on the cylinders after bringing his car in for other repairs.⁴ Plaintiff further testified that after performing the requested compression test he advised defendant that several valves needed replacing and that in view of the age of the automobile the rings probably needed replacing also. Plaintiff said that no *estimate* of the cost of repairing either the valves or the rings was ever given to defendant, apparently for the reason that the need for such repairs

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1. OFFICE OF CONSUMER AFFAIRS, STATE CONSUMER ACTION, SUMMARY '71 at 11 (U.S. Gov't Printing Office, 1971). Automobiles (new, used, repairs, warranties, etc.) was listed in the top ten complaint categories by 43 of the 73 reporting offices, while 31 listed deceptive and misleading advertising, and 28 listed credit practices (billing, collection, and holder-in-due course). The remaining categories were non-delivery of merchandise (26), magazine and book sales (25), home improvements (22), franchises and multi-level distributorship plans (22), warranties and guaranties (21) and sales practices (bait and switch, referral sales, high pressure sales) (17).

2. Internal Research Memorandum of September 12, 1974, Governor's Office of Consumer Protection (GOCP). Based upon some 6000 complaints received by the GOCP, the top seven complaint categories and their approximate percentages were: automobile complaints (18.7); mobile homes (10); mail order (8); home construction (4.8); apartment and house rental (4.5); credit (3); utilities (2.6).

3. 293 So. 2d 595 (La. App. 4th Cir. 1974).

4. Defendant and plaintiff were in apparent agreement with respect to other miscellaneous repairs, including certain front-end and air-conditioning work. *Id.* at 596.

could not be known prior to removing the cylinder heads, but that after the cylinder heads were removed, he informed the defendant that the rings did need replacing. In plaintiff's version, defendant responded to this information by telling plaintiff to do the valve job and other unrelated repairs and that he did not want to spend a great deal of money.

When defendant's auto still emitted smoke after completion of the valve job, defendant refused to pay plaintiff's bill, and the issue was framed: what contract existed between the parties? Was it the understanding of the parties that a valve job be done *only* if the oil and smoke problem would thereby be cured? Or did the parties agree that a valve job be done whether or not the oil and smoke problem would thereby be cured? Alternatively, did the contract comprehend the performance by plaintiff of *any* repairs necessary to cure the problem? The court of appeal affirmed the trial court's ruling that the principal cause for authorizing the valve job was the elimination of oil consumption, and that inasmuch as the valve job did not remedy the problem, the contract was invalidated and plaintiff was not permitted to recover its expenditure of \$71.58.⁵ Also affirmed by the court was the ruling below that defendant had failed to offer any substantiating evidence regarding his reconventional demand for \$1000 for repairing the engine after plaintiff had finished with it and for \$5000 as compensation for pain and anguish.

The facts of the *Breithoff* case are obviously close, and it's doubtful that any judicial solution in such cases ever yields a satisfactory result for the parties involved. A requirement of a written estimate for all repairs over a given amount (\$50, for example) with the further requirements that the actual cost of estimated repairs may not exceed ten percent of the estimate, and that any additional repairs subsequently shown to be necessary or advisable may not be performed without the subsequently obtained authorization of the owner would seem a more satisfactory and sensible approach.⁶ In fact, legislation of a comprehensive nature is called for.⁷

5. The trial court's ruling was amended so as to allow recovery by plaintiff of \$181.18 for parts and labor in removing the cylinder heads and for the items of repair not related to the controversy.

6. House Bill No. 1466, introduced in, but not passed by the 1974 Regular Session of the Louisiana Legislature, would have required that all automobile repair work be recorded and described on an invoice; a disclosure of any use of used or rebuilt parts; that upon request by the customer, the automobile repair dealer provide a written estimate of the price of labor and parts; that the estimate could not exceed \$10 or 10%, whichever is larger, without the oral or written consent of the customer; and that upon request of the customer, a dealer tender to the customer upon completion of the work, for customer's inspection, all replaced parts.

7. In addition to House Bill No. 1466, House Bill No. 1206 was introduced but not

PUBLIC UTILITY LATE PAYMENT CHARGES

Charges for delinquent, delayed, or late payment have been a traditional feature of the extension of consumer credit, but perhaps in no consumer-creditor relationship does the imposition of such charges rankle the consumer as much as in the symbiotic one between consumers and the various public utility bodies. Lack of consumer bargaining power, brought about by the monopolistic legal position of utilities, driven home by "take-it-or-leave-it" contracts, results in understandable frustration. While late payment charges imposed in connection with consumer credit transactions are generally subject to the disclosure requirements of the Consumer Credit Protection Act ("Truth in Lending")⁸ and the rate of such charges is regulated by the Louisiana Consumer Credit Law,⁹ late payment charges by public utility companies are exempt from those laws¹⁰ and from the Louisiana Unfair Trade Practices and Consumer Protection Law.¹¹ In the case of the Consumer Credit Protection Act, "[t]ransactions under public utility tariffs" are expressly exempted from the act's coverage by section 1603(4) "if the [Federal Reserve] Board *determines* that a State regulatory body regulates the charges for the public utility services involved, the charges for delayed payment, and any discount allowed for early payment."¹²

In *Grein v. Hawkins*,¹³ defendant's reconventional demand to plaintiff's suit for sewage services¹⁴ raised the interesting argument that since no evidence was introduced by plaintiff that the Board of Governors of the Federal Reserve System had in fact determined by positive action that a Louisiana state regulatory body regulates the charges set forth in section 1603(4), the exemption did not apply. Defendant did not argue that such charges are unregulated in Louisiana, and the Third Circuit Court of Appeal predictably refused to accept defendant's argument,¹⁵ holding that the utility in question

passed by the 1974 Regular Session. Both bills provide for licensing and regulation of the motor vehicle repair business. House Concurrent Resolution No. 233 directs the Commerce Committees to establish a sub-committee to look into automobile repairs and report back to the 1975 Legislative session.

8. 15 U.S.C. § 1638(a)(9) (1968); 12 C.F.R. § 226.7(b)(4) (1974). *But see* 12 C.F.R. § 226.4(c) (1974).

9. LA. R.S. 9:3525 (Supp. 1972).

10. 15 U.S.C. § 1603(4) (1968); 12 C.F.R. § 226.3(d) (1974); LA. R.S. 9:3512(3) (Supp. 1972).

11. LA. R.S. 51:1406(1) (Supp. 1972).

12. 15 U.S.C. § 1603(4) (1968) (emphasis added).

13. 295 So. 2d 219 (La. App. 3d Cir. 1974).

14. *See* LA. R.S. 45:1203 (Supp. 1960).

15. Even assuming that defendant had successfully attacked the exemption, the

was in fact regulated by a state regulatory body and was therefore exempt within the *meaning* of section 1603(4) of the federal act.¹⁶ The correctness of the decision is buttressed by the fact that the Board has ruled in Regulation Z¹⁷ §226.3(d), that public utility transactions are exempt if the charges mentioned in section 1603(4) "are filed with, reviewed by, or regulated by an agency of the Federal Government, a State, or a political subdivision thereof."¹⁸ The Board has, in addition, made no "determinations" under section 1603(4) and has, in fact, granted no exemptions to any particular utility.

The Louisiana Consumer Credit Law provides an exemption for public utility transactions¹⁹ which is patterned upon section 226.3(d) of Regulation Z, while the Louisiana Unfair Trade Practices and Consumer Protection Law is expressly inapplicable to "[a]ctions or transactions subject to the jurisdiction of the Louisiana Public Service Commission or other public utility regulatory body."²⁰ Conceding that the two Louisiana Acts are inapplicable to public utility transactions, the Fourth Circuit Court of Appeal in *State v. Council of City of New Orleans*²¹ has ruled that public utility late charges nevertheless may be in violation of Civil Code article 2924. Both the New Orleans Public Service, Inc. (NOPSI) and the Louisiana Power and Light Company (LP&L)²² operate pursuant to a rate schedule which provides that the customer's net monthly bill (calculated in accordance with the applicable rate) "will be increased ten percent if payment is not made on or before the due date shown on the bill, which shall not be less than 10 days after it is rendered."²³ The Attorney General, acting as a representative of the Louisiana consumer public at large and on behalf of state agencies located in the City of New Orleans consuming gas and electricity, challenged the ten per-

federal Truth-in-Lending law would not necessarily have been violated. See 12 C.F.R. §§ 226.2(k), .2(m), .4(c) (1974).

16. See also *Ferguson v. Electric Power Bd.*, 378 F. Supp. 787 (E.D. Tenn. 1974).

17. 12 C.F.R. § 226 (1974). See *The Work of the Louisiana Appellate Courts for the 1972-1973 Term — Consumer Law*, 34 LA. L. REV. 326 n.2.

18. 12 C.F.R. § 226.3(d) (1974). The importance of Board regulations has been greatly enhanced by the decision of the United States Supreme Court in *Mourning v. Family Publications Serv.*, 411 U.S. 356 (1973).

19. LA. R.S. 9:3512(3) (Supp. 1972).

20. LA. R.S. 51:1406(1) (Supp. 1972).

21. 297 So. 2d 518 (La. App. 4th Cir. 1974).

22. NOPSI provides gas and electric services to all but the Fifth Municipal District in the City of New Orleans. LP&L, an intervenor in the case, provides service for the Fifth Municipal District. The billing and collection practices of LP&L and NOPSI are the same. *Id.* at 519.

23. *Id.* at 519-20.

cent increase as violative of article 2924 in an action²⁴ filed against NOPSI and the Council of the City of New Orleans. The district court dismissed the suit, concluding that the ten percent late payment charge was a vital part of the basic rate-making structure and not "interest as damages for non-payment of money." On the contrary, the trial court determined that the charge was designed to allocate the cost of late payment of utility bills to the customers responsible, and that the charge was a practical method of preventing discrimination among the utility's customers.

The Fourth Circuit Court of Appeal reversed the lower court's decision and has thereby set the stage for what may be the most far-reaching consumer law decision to date by the Louisiana supreme court. The substance of NOPSI's argument is that the late charge is a *rate differential* used to offset expenses attributable to delayed, delinquent and uncollectible accounts, and charged to those customers responsible for such expenses. In addition, NOPSI views the late charge as an inducement to customers to pay their bills promptly. The Fourth Circuit, however, viewed the charge to late paying customers as a discriminatory underwriting by those customers of the expenses caused by other customers who *never* pay (uncollectible accounts) and still others whose service is reconnected following a disconnection for non-payment. Since the court found no relationship between the expenses incident to the two classes of customers, it concluded that the late charges constitute unjust discrimination, and held them not to be a "utility rate."

The court also disposed of NOPSI's argument that the late charge is a permissible "time-price differential," by holding the charge to be a penalty for failure to pay at a designated time and "interest" as defined in Civil Code article 1935.²⁵ Thus, the ten percent rate violated the eight percent limit for conventional interest allowed by Civil Code article 2924.²⁶

FINANCE CHARGES

Lender credit cards²⁷ are perhaps the latest step in an evolution-

24. The Attorney General additionally, but unsuccessfully, alleged that NOPSI and the Council were in violation of the Unfair Trade Practices and Consumer Protection Law, LA. R.S. 51:1401-18 (Supp. 1972).

25. LA. CIV. CODE art. 1935 defines interest as: "The damages due for delay in the performance of an obligation to pay money are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered he can recover no more."

26. Cf. *Ferguson v. Electric Power Bd.*, 378 F. Supp. 787 (E.D. Tenn. 1974) (public utilities late charge did not violate Tennessee usury law).

27. Defined by the Louisiana Consumer Credit Law as "an arrangement or loan

ary process seemingly headed toward a "cashless" society.²⁸ The process began in the 1940's with the increasing acceptance by both consumers and retailers of the charge card or charge plate, and continued into the 1950's and 1960's with the mass mailing of largely unsolicited oil company credit cards.²⁹ The major areas of controversy surrounding the use of credit cards have been: liability of the consumer for unauthorized use³⁰ of both solicited and unsolicited cards, the legality of monthly finance charges (typically 1½% per month) under local usury laws,³¹ use of the "previous balance" method³² in applying the monthly finance charge, and the imposition of interest on interest.³³ In Louisiana, while the problems of liability, permissible monthly charges, and of the use of the previous balance method have been resolved by a combination of the Consumer Credit Protection Act³⁴ and the Louisiana Consumer Credit Law,³⁵ the issue of interest on interest seems unresolved at this point.

Incident to the enactment of the Louisiana Consumer Credit

agreement. . . pursuant to which a lender gives a consumer the privilege of using a credit card, letter of credit or other credit confirmation or identification in transactions out of which debt arises, (a) by the lender's payment or agreement to pay the consumer's obligations; or, (b) by the lender's purchase from the obligee of the consumer's obligations." LA. R.S. 9:3516(18) (Supp. 1972). "Mastercharge" and "BankAmericard" cards are examples. Use of lender credit cards results in a revolving loan account. Use of seller credit cards (department stores, oil companies) results in a revolving charge account. See LA. R.S. 9:3516(25) (Supp. 1972).

28. See Bergsten, *Credit Cards — A Prelude to the Cashless Society*, 8 B.C. IND. & COM. L. REV. 485 (1967).

29. By 1967, one estimate put at 200,000,000 the number of credit cards in use. Note,⁷⁷ YALE L.J. 1418 (1968).

30. Card issuers initially attempted to expressly place liability on the card user for all purchases by anyone until *surrender* to the issuer of the card. See *Magnolia Pet. Co. v. McMillan*, 168 S.W.2d 881 (Tex. Civ. App. 1943).

31. See *State v. Younker Bros., Inc.*, 210 N.W.2d 550 (Iowa 1973).

32. The assessment of the finance charge on the balance of the account as of the beginning of the billing period, as opposed to the actual unpaid balance at the time that the charge is imposed.

33. Compounding of the finance charge results when the finance charge for a given billing period is assessed on an unpaid account balance which includes previously imposed but unpaid finance charges.

34. See 15 U.S.C. §§ 1642-44 (1970) (liability of cardholders).

35. LA. R.S. 9:3524 (Supp. 1972) authorized the imposition of a loan finance charge on a lender credit card revolving loan account of 1½% per month, which charge may be assessed on the balance of the account on the first day of each billing period without regard to transactions affecting the account during the billing period. Similar provisions are set out with respect to seller credit card revolving charge accounts under LA. R.S. 9:3523 (Supp. 1972). Both sections also permitted use of the "average daily unpaid balance of the account" method of assessing the finance charge. But see notes 38-39 *infra*.

Law, article 1939 of the Civil Code was amended and re-enacted so as to state: "except as provided by the Louisiana Consumer Credit Law, interest upon interest cannot be recovered unless it be added to the principal, and by another contract made a new debt."³⁶ Because the "balance of the account on the first day of each billing period"³⁷ can be construed to mean "balance of unpaid principal and accrued finance charges from previous billing periods," it is arguable that the Louisiana Consumer Credit Law authorized both the "previous balance" method of computation³⁸ and the imposition of interest on interest.³⁹ In any event, the Consumer Credit Protection Act would require disclosures pertinent to the finance charge and the annual percentage rate⁴⁰ upon which a consumer-user could base a cause of action pertaining to the assessment of the monthly charge. The decision of the Fourth Circuit Court of Appeal in *First National Bank of Commerce v. Eaves*⁴¹ may hasten a decision on these issues.

Defendant in *Eaves*, upon being sued for the balance owing on his BankAmericard account,⁴² reconvened on the basis of plaintiff's charging interest upon interest. From the dismissal of the reconventional demand on exceptions of no right and no cause of action,⁴³ he

36. LA. CIV. CODE art. 1939.

37. LA. R.S. 9:3523-24 (Supp. 1972).

38. Section 3523 of the Consumer Credit Law states with respect to the balance of a revolving charge account only that it is not to regard "transactions affecting the account during the billing period." By contrast, section 3524 states that "the face amount of the checks. . . or similar written instruments received by the extender of credit in connection with the revolving loan or the amounts actually paid pursuant to the consumer's direction to pay, less the amount applicable to principal from time to time paid thereon by the consumer, *shall be* the unpaid balance of the debt upon which said loan finance charge *shall be* computed." LA. R.S. 9:3523-24 (Supp. 1972) (emphasis added).

Section 3524 was amended during the 1974 Session of the Louisiana Legislature, and effective January 1, 1975, loan finance charges may be computed only on the average daily balance of the account during the billing period or other method not yielding a charge greater than that method. La. Acts 1974, No. 466 § 1. Section 3523 was not similarly amended. See La. H.B. 1375, Reg. Sess. 1974.

39. Since R.S. 9:3524 gave the extender of credit the alternative to apply the 1½% per month to the "average daily unpaid balance of the *principal* of the debt during the billing period," the wording of the alternative suggests that interest on interest is permissible with respect to the "first day balance" method. R.S. 9:3523 speaks of the "balance of the account" with respect to both the alternative methods it sets up.

As amended, section 3524 permits the computation in accordance with the average daily unpaid balance of the *principal* of the debt during the billing period. LA. R.S. 9:3524, *as amended* by La. Acts 1974, No. 466 § 1.

40. 12 C.F.R. § 226.7 (1974).

41. 282 So. 2d 741 (La. App. 4th Cir. 1973).

42. *Id.* at 742. Plaintiff also sought attorney's fees.

43. *Id.* at 745.

took appeal to the Fourth Circuit. In reversing the lower court's ruling, the court of appeal concluded that defendant's demand in reconvention stated a cause of action and that federal usury law⁴⁴ does not provide an exclusive remedy as to national banks.⁴⁵ In the view of the Fourth Circuit, among the theoretical causes of action stated by defendant's "interest on interest" allegations were: the federal usury law,⁴⁶ the federal Truth in Lending law,⁴⁷ and article 2924 of the Civil Code.⁴⁸

In *Berry v. Thompson*,⁴⁹ a landlord had leased to the tenant a dwelling for the term of one year at a rental of \$150, payable monthly in advance. Tenant vacated the premises after eight months, complaining of problems regarding the sewer system. Landlord exercised an acceleration clause⁵⁰ in the lease and filed suit for \$600 rent remaining for the term which was met by tenant's reconventional demand seeking damages for failure to make disclosures required by section 1640 of the Consumer Credit Protection Act ("Truth in Lending").⁵¹ The Second Circuit Court of Appeal held, however, that such a real estate lease is not a "consumer credit"⁵² transaction within the coverage of the Consumer Credit Protection Act.⁵³

Because the main thrust of the disclosures required by the federal law pertains to the cost of sale or loan credit expressed in terms of a finance charge and an annual percentage rate,⁵⁴ and such disclosures would have little meaning in most dwelling lease transactions involving no finance charge, one can easily agree with the court's ruling. However, the issue raised in *Berry*, as is so often the case in situations involving the scope of the federal act, has a superficial simplicity which may be shown by closer examination to be deceptive. The act does not, for example, expressly exempt consumer dwelling lease transactions from coverage;⁵⁵ nor are such transactions

44. Plaintiff relied upon 12 U.S.C. § 86 (1970).

45. 282 So. 2d at 745. Cf. *Ratner v. Chemical Bank New York Trust Co.*, 309 F. Supp. 983 (S.D.N.Y. 1970).

46. 12 U.S.C. § 86 (1970).

47. 15 U.S.C. § 1640(a)-(e) (1970).

48. The operative facts of the case apparently pre-date the Louisiana Consumer Credit Law, LA. R.S. 9:3510-68 (Supp. 1972).

49. 297 So. 2d 484 (La. App. 2d Cir. 1974).

50. The clause provided that if the tenant failed to pay any one month's rent when due, *all* the unmatured rent became due and exigible, at landlord's option. 297 So. 2d at 485.

51. 15 U.S.C. § 1640 (1970).

52. See 12 C.F.R. § 226.2(k) (1974).

53. 297 So. 2d at 486.

54. See 12 C.F.R. §§ 226.2(e), .2(q), .4, .5, .6, .7, .8 (1974).

55. See 15 U.S.C. § 1603 (1970); 12 C.F.R. § 226.3 (1974).

definitionally excludable either. "Consumer credit" is broadly defined under the act as the right granted by a creditor (a person who in the ordinary course of business regularly extends or offers to extend consumer credit) to a natural person to incur debt and defer its payment, where the money, property, or service which is the subject of the transaction is primarily for personal, family, household or agricultural purposes and for which *either* a finance charge is imposed or which, pursuant to an agreement *is or may be repayable in more than four installments*.⁵⁶ The lease in *Berry* conceivably can be viewed from the standpoint of the federal act as an \$1800 debt incurred by the consumer, the repayment of which is *deferred* over the one-year term by twelve equal monthly installment payments of \$150 subject to an acceleration clause. So viewed, the act's disclosure requirements would be triggered, and given a failure to make the required disclosures, the consumer would be entitled to a recovery under section 1640 of the Consumer Credit Protection Act of \$100, costs, and attorney's fees.⁵⁷

CONSUMERS AND THE RECALCITRANT LANDLORD

In 1972 the Louisiana Legislature enacted much-needed reform legislation regulating the landlord-tenant relationship⁵⁸ by requiring the return of tenant deposits or advances within one month of termination of the lease.⁵⁹ Under R.S. 9:3251 a landlord may retain all or any portion of a deposit or advance to remedy a default by a tenant, or to remedy unreasonable wear to the premises attributable to the

56. 12 C.F.R. §§ 226.2(k), (l), (m) (1974).

57. 15 U.S.C. § 1640 (1970). Opinion letters by two Federal Reserve Board attorneys take the view that the typical apartment lease arrangement was not intended by Congress to be brought within the sweep of "consumer credit" transactions unless the lease is open-end, with an option to buy on the part of the lessee for nominal consideration (*i.e.*, a "credit sale" under 12 C.F.R. § 226.2). See FRB Letter of July 31, 1973, by Griffith L. Garwood in 4 CCH CONS. CRED. GUIDE ¶30,998 (Automobile Closed End Lease Arrangements); FRB Letter of Aug. 23, 1973, by Jerauld C. Kluckman in 4 CCH Cons. Cred. Guide ¶31,021 (Apartment or Hotel Rental Agreement). On the other hand, Mr. Garwood has subsequently expressed concern on behalf on the Federal Reserve Board "that the rapidly expanding area of consumer leasing may represent a major potential loophole in Truth in Lending." FRB Letter of Sept. 12, 1973, by Griffith L. Garwood in 4 CCH CONS. CRED. GUIDE ¶31,029. The fact that consumer dwelling leases may not come within the definition of a "credit sale" under Reg. Z § 226.2(n) [12 C.F.R. § 226.2 (1974)] does not mean that "consumer credit" has not been extended under §§ 226.2(k), (l), and (m), calling for the disclosures set forth in §§ 226.8(b), (d). *Cf. Mourning v. Family Publications Serv.*, 411 U.S. 356 (1973).

58. See note 2 *supra*.

59. LA. R.S. 9:3251-54 (Supp. 1972).

occupancy of the tenant;⁶⁰ but retention of any portion of the deposit or advance triggers a requirement that the landlord forward to the tenant within one month of the termination date an itemized statement accounting for and giving reasons for his action.⁶¹

The traditional problem with respect to return of tenant deposits or advances has been the unequal bargaining position of the tenant — recovery from recalcitrant landlords or their agents often required the assistance of an attorney, whose best advice would be that pursuit of the matter was not economically feasible.⁶² To remedy this inequality of bargaining power, and to provide a meaningful enforcement of the requirements pertaining to the itemized accounting and statement of reasons for the retention of a deposit or advance, the Legislature provided that any purported *waiver* by the tenant of rights under the act is null and void,⁶³ that a *willful* failure by the landlord to comply with section 3251 gives the tenant the right to recover from the landlord actual damages or \$200, whichever is greater, and that costs and attorney's fees may in the court's discretion be awarded to a prevailing tenant in a "willful failure" case.⁶⁴ The statute also sets up as one category of "willful failure" the refusal to remit within thirty days after written demand for a refund.⁶⁵

Though the tenant deposit statute is perhaps an improvement over prior law, some potentially difficult issues remain,⁶⁶ as illus-

60. LA. R.S. 9:3251 (Supp. 1972). A recent opinion of the Louisiana Attorney General indicates that cleaning, mopping, waxing and related activities do not constitute remedying "unreasonable wear" of the premises and that the landlord therefore may not deduct his cleaning costs from the tenant's deposit on that basis. However, the opinion did say that such costs may be deducted if the lease specifically imposes on the tenant the obligation to clean the premises and, under LA. CIV. CODE arts. 2719 and 2720, if the premises were in a clean condition when turned over to the tenant at the beginning of the lease. 1974 LA. OP. ATTY. GEN. No. 75-35 (Dec. 16, 1974).

61. *Id.* The section contains dual requirements: itemized accounting *and* a statement of reasons. Specificity would seem to be the statutory norm, so that a statement advising the tenant that "\$30 of his deposit was retained to cover the cost of carpet cleaning" would be incomplete under section 3251 unless accompanied by a statement supportive of the *need* for such maintenance from the standpoint of "unreasonable wear," as opposed, for example, to normal maintenance.

62. See *Cantelli v. Tonti*, 297 So. 2d 766, 769 (La. App. 4th Cir. 1974).

63. LA. R.S. 9:3254 (Supp. 1972).

64. A prevailing landlord in such a case is similarly eligible for an award of costs and attorney's fees. LA. R.S. 9:3253 (Supp. 1972).

65. LA. R.S. 9:3253 (Supp. 1972).

66. *E.g.*, Termination (and notice thereof by tenant) vs. automatic lease renewal provisions; accounting of "remedied" defaults other than in rent payments; the "unreasonable wear" loophole; the requisite specificity of the landlord's reasons for retention; the possibility of showing a "willful failure" beyond a refusal to remit upon written demand for refund.

trated by *Moore v. Drexel Homes, Inc.*⁶⁷ The lease provided that a failure to give notice⁶⁸ of termination at least thirty days prior to the expiration of term resulted in an automatic renewal of the lease. Tenant testified that he mailed a notice in a timely fashion, but landlord disputed receipt thereof.⁶⁹ Subsequent to vacating the premises, tenant made repeated written demands on landlord for return of his deposit of \$100. Landlord at no time replied, remitted, or forwarded to tenant an itemized accounting, presumably in reliance on the renewal provision. But landlord's testimony regarding non-receipt of tenant's notice was found wanting by the Fourth Circuit Court of Appeal, the court concluding that tenant's notice was effective⁷⁰ and that landlord's failure to return the deposit upon tenant's demand, or alternatively, to comply with section 3251 was a "willful" failure under 3252. Tenant was granted a judgment for \$200 and awarded \$300 as attorney's fees under section 3253, upon the premise that landlord had ignored his repeated demands for return of deposit or an accounting, leaving tenant no recourse but to file suit.

In *Bradwell v. Carter*,⁷¹ landlord and tenant had a bona fide dispute as to the responsibility for certain repairs, the cost of which tenant had deducted from her rental payment.⁷² Landlord thereafter demanded the full rent, but gave tenant the option to vacate without complying with the notice provisions of the lease — an option tenant exercised forthwith. Some four months later tenant demanded return of her \$50 deposit. Landlord neither returned the deposit nor complied with the requirements of section 3251. The trial court ordered return of the deposit and awarded attorney's fees, but denied damages on the basis that the bona fide dispute rendered landlord's failure to remit not willful. The First Circuit Court of Appeal, correctly categorizing the repairs dispute as irrelevant, amended the trial court's judgment so as to award tenant an additional \$200, making the following observations:

67. 293 So. 2d 500 (La. App. 4th Cir. 1974).

68. The expiration date of the lease was January 31, 1971. Tenant's notice was allegedly sent on December 26, 1970, but rather than stating his intent to terminate as of February 1, 1971, tenant advised landlord of his intent to move into a home on or before June 1, 1971 and that he "would like to continue to rent. . . on a month to month basis until such time." Tenant did not actually vacate the apartment until July 31, 1972, after mailing to landlord a notice of such intent on June 22, 1972.

69. Tenant's rent check, which allegedly was mailed with the disputed notice, was received by the landlord. 293 So. 2d at 501-02.

70. See note 68 *supra*.

71. 299 So. 2d 853 (La. App. 1st Cir. 1974).

72. *Id.* The dispute involved the sum of \$15.

We can see no reason why the statute should not be enforced according to its terms, which are clear and unambiguous. We think that the Legislature intended by this statute to require landlords to remit or account for rental deposits as required by the act, or to suffer the penalties therein provided.⁷³

The *Bradwell* and *Moore* cases clearly demonstrate that the Lessee Deposit Act is working as intended by the Legislature, and if the example set by the Fourth Circuit Court of Appeal in *Cantelli v. Tonti*⁷⁴ with respect to the award of attorney's fees is followed by other courts in Louisiana, the act will indeed be effective. The landlord in *Cantelli* failed to either remit the tenants' deposit of \$150 or give a reason for its retention within thirty days of the first of tenants' two written demands,⁷⁵ but as in *Bradwell*, the trial court had granted judgment only for the deposit, with no award under the willful failure provision of section 3252 of the act. The Fourth Circuit, however, held the landlord's failure to comply with section 3251 as willful,⁷⁶ and amended the award by granting tenants, in addition to the return of their \$150 deposit, an award of \$200, together with attorney's fees in the amount of \$750.⁷⁷

CONSUMERS AND THE RECALCITRANT MERCHANT

The court of appeal decisions in *Axelrod v. Wardrobe Cleaners, Inc.*,⁷⁸ *Leatherman v. Miller's Mutual Fire Insurance Co.*,⁷⁹ and *Thomas v. House of Toyota*⁸⁰ exemplify two important points of consumer law. First, some merchants often attempt to disclaim liability for loss or damages to goods entrusted to their care by consumers.⁸¹ All too often the result is that consumers who have claims to press in various situations are confronted with a curious phenomenon: a circle of would-be responsible parties, each of whom is pointing to the per-

73. *Id.* at 854.

74. 297 So. 2d 766 (La. App. 4th Cir. 1974).

75. *Id.* at 769.

76. "Defendant made no attempt to justify its failure to return the security deposit. . . . Astonishingly, the defendants offered no evidence whatever, testimonial or documentary, in support of their position." *Id.*

77. In awarding attorney's fees, the court considered the time involved in original consultation and research preparatory to filing suit, drafting of the pleadings, pretrial preparation and interviews, two court appearances, preparation of appellate briefs, and argument before the court of appeal. 297 So. 2d at 769, 770.

78. 289 So. 2d 847 (La. App. 4th Cir. 1974).

79. 297 So. 2d 541 (La. App. 3d Cir. 1974).

80. 286 So. 2d 504 (La. App. 1st Cir. 1973).

81. The disclaimer often takes the form of a sign proclaiming "not responsible for loss or damage due to fire, theft or accident."

son on his left as the guilty party. Second, resort by consumers to litigation in such situations, unfortunate as the necessity of it may be, can be and usually is successful. In the *Axelrod* case, for example, an award of \$1000 to the consumer as replacement value for draperies ruined⁸² during the process of dry-cleaning by defendant was affirmed by the Fourth Circuit Court of Appeal. Defendant pointed out that inferior fabric dye, rather than the cleaning process itself, could have caused the damage, and that with new imported fabrics it is difficult to predict how the dyes will react to the cleaning process.⁸³ Defendant also offered evidence that pre-testing for colorfastness is impractical since an unsuccessful test would damage the area of the fabric tested. But since defendant's agent had inspected the drapes and (impliedly) satisfied himself that they would withstand dry-cleaning, defendant's unconditional acceptance of them was an implied assurance to the plaintiff that the drapes could withstand the process, and the relationship of bailment for hire was created, imposing upon defendant the duty under Civil Code article 2937 of diligent care of a prudent administrator.

The facts in the *Leatherman* case were likewise undisputed. Plaintiff left his automobile at the business premises of defendant's insured, where it was irretrievably stolen from inside a locked building. The break-in was apparently describable only as "effortless."⁸⁴ An unopened safe secured the keys to all customer automobiles except plaintiff's,⁸⁵ whose auto was the only one stolen. Citing the decision of the Louisiana supreme court in *Coe Oil Service, Inc. v. Hair*,⁸⁶ a factually similar case, the Third Circuit Court of Appeal affirmed the ruling of the trial court that defendant's insured failed to meet the standard of care of a prudent administrator to preserve the plaintiff's property as required of a compensated depositary under articles 2937 and 2938.

Similar to the decisions of *Axelrod* and *Leatherman* are the First Circuit Court of Appeal decisions in *Landry v. State Farm Mutual*

82. Defendant did not deny that the drapes were damaged while in its custody.

83. *Axelrod v. Wardrobe Cleaners, Inc.*, 289 So. 2d 847, 849 (La. App. 4th Cir. 1974).

84. Entry was gained through unsecured glass pane windows in the rear of the building, and the plaintiff's automobile driven out through sliding doors after breaking an inside lock. *Leatherman v. Miller's Mut. Fire Ins. Co.*, 297 So. 2d 541, 542 (La. App. 3d Cir. 1974).

85. Plaintiff's keys were apparently left unprotected by an employee working late, presumably on plaintiff's automobile.

86. 283 So. 2d 734 (La. 1973).

*Automobile Insurance Co.*⁸⁷ and *Thomas v. House of Toyota*.⁸⁸ In *Toyota*, defendant automobile dealer, acting as an agent of the defendant insurance agency collected from plaintiff as an incident to the sale to plaintiff of a used automobile, the sum of \$203 for the purpose of obtaining collision insurance for the vehicle.⁸⁹ The automobile was purchased for the use of plaintiff's son, a person under 21 years of age. For reasons not convincingly explained by the defendants and no doubt best known to them, collision insurance coverage was obtained for plaintiff only, at a cost of \$122, which coverage was subsequently cancelled by the insurers for the reason that plaintiff's son was shown to be the principal driver of the vehicle.⁹⁰ Defendant insurance agency advised plaintiff's son of the reason for the cancellation, but whether the impression was left with plaintiff's son that the agency would contact him later about further coverage was a disputed matter. Neither plaintiff nor his son, however, demanded a return of premium or an explanation of the \$203 paid. Thereafter the subject automobile was involved in an accident and damaged to the extent of \$882.95. No collision coverage was then in force. The First Circuit affirmed the lower court's judgment in favor of plaintiff⁹¹ in the amount of \$590.03,⁹² classifying both defendants as brokers⁹³ owing a fiduciary responsibility to the insured as well as to the insurer. The obligation was breached by the failure of the defendants to investigate the discrepancy in the amount received from plaintiff and the amount actually paid for the coverage, and the type of coverage actually provided.

The insurer in *Landry* refused to make medical payments to its insured who was injured while operating a truck which was struck by another vehicle. The same policy language⁹⁴ had earlier been inter-

87. 298 So. 2d 291 (La. App. 1st Cir. 1974).

88. 286 So. 2d 504 (La. App. 1st Cir. 1973).

89. Both the chattel mortgage and the purchase order reflected that the \$203 amount was to be used to purchase the collision insurance. The figure of \$203 was obtained from the defendant insurance agency at the request of Toyota.

90. From the viewpoint of the insurer, the sum of \$122 would not provide coverage for plaintiff and an under-age principal driver; however, it was apparently undisputed that the sum of \$203 was sufficient to provide the requested coverage.

91. Judgment was entered by the Baton Rouge City Court against both defendants, *in solido*, but only the defendant insurance agency appealed.

92. Defendant was held entitled to credits of \$100 (the "deductible" portion of the policy) and \$192.92, an amount returned to plaintiff prior to trial.

93. Toyota had received a commission in connection with the insurance portion of the transaction.

94. Medical payments were to be made under the policy "to. . . the named insured. . . who sustains bodily injury. . . caused by accident (a) while occupying the owned automobile, (b) while occupying a non-owned automobile. . . or (c) through being struck by an automobile or by a trailer of any type. . . ." *Landry v. State Farm Mut. Auto Ins. Co.*, 298 So. 2d 291, 292-93 (La. App. 1st Cir. 1974).

preted by the First Circuit Court of Appeal as providing coverage under similar circumstances,⁹⁵ and for that reason the court held the failure to pay medical benefits under the policy was arbitrary and capricious. Noting that "the insurer not only misinterpreted the provisions of its own policy but also ignored judicial interpretation thereof," the court awarded plaintiff-insured a statutory penalty of 12% of his medical expenses recovery plus attorney's fees of \$750 under R.S. 22:658. *Landry* illustrates the potential therapeutic effect of statutes such as R.S. 22:658, and the legislature should consider enacting such statutes applicable to the numerous transactions and situations involving consumers and recalcitrant merchants and business entities.

TREBLE DAMAGES UNDER THE UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW

The Fourth Circuit Court of Appeal held in *Faris v. Model's Guild*⁹⁶ that the failure of defendant modeling school to be licensed under the Proprietary Schools Act⁹⁷ left it without authority to engage in the business of a "proprietary school," rendering its contract with plaintiff unenforceable. Apparently on the basis of defendant's legal incapacity, plaintiff also sought treble damages and attorney's fees under section 1409 of the Louisiana Unfair Trade Practices and Consumer Protection Law.⁹⁸ The affirmance by the court of the trial court's dismissal of the plaintiff's action aptly demonstrates the hurdles confronting the consumer under section 1409: treble damages and attorney's fees are based upon proof of *actual* damages sustained, always a difficult problem of proof. An award of treble damages carries the additional prerequisite of proof that the defendant knowingly used an unfair or deceptive method, act or practice after being "put on notice" by the director of the Consumer Protection Division or by the Attorney General.⁹⁹ There was apparently neither a showing in *Faris* that actual damages were sustained nor that defendant was

95. In *Blanchard v. Hanover Ins. Co.*, 250 So. 2d 484 (La. App. 1st Cir. 1971), the court had held, contrary to defendant's argument in *Landry*, that the language of subsection "c" contemplated coverage in the situation where an insured is not occupying the vehicle but is physically outside the vehicle.

96. 297 So. 2d 536 (La. App. 4th Cir. 1974).

97. LA. R.S. 17:3141.1-.14 (Supp. 1972). Perhaps due to its violation, defendant failed to grant plaintiff's request that her attorney review defendant's documents prior to signing. 297 So. 2d at 537.

98. LA. R.S. 51:1401-18 (Supp. 1972).

99. LA. R.S. 51:1409(A) (Supp. 1972). See *Symposium: Louisiana's New Consumer Protection Legislation*, 34 LA. L. REV. 597, 645-47 (1974).

"put on notice."¹⁰⁰ The *Faris* case must be viewed in part as a failure by plaintiff to prove actual damages, for it is clear that actual damages can be shown in such cases.¹⁰¹

An additional aspect of *Faris* is germane within the context of the Unfair Trade Practices and Consumer Protection Law. Defendant's unauthorized conduct of business as a proprietary school was in itself arguably a deceptive act or practice under the Louisiana act,¹⁰² and the fact that some question was raised as to whether any of its "graduates" were being employed¹⁰³ as models makes the case stronger, even though defendant expressly disclaimed any guarantee of placement.¹⁰⁴ Such a conclusion is, under the purposes and intent of the law, the same, despite the fact that defendant's acts may not have constituted "fraud."¹⁰⁵

CONSUMER PRIVACY

Defendant in *Fassitt v. United T.V. Rental, Inc.*¹⁰⁶ rented to plaintiffs a stereo phonograph at a cost of \$7.35 per week. While defendant's radio advertising stated that "all the rent money you pay

100. Subsequent to the transaction in question defendant had entered into an Assurance of Voluntary Compliance under the provisions of section 1410 of the Unfair Trade Practices and Consumer Protection Law, and as the Fourth Circuit pointed out, such an action "shall not be considered an admission of violation for any purpose" under La. R.S. 51:1410 (Supp. 1972). 297 So. 2d at 540.

101. See *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934). Cf. *National Dynamics Corp. v. John Surrey, Ltd.*, 238 F. Supp. 423 (S.D.N.Y. 1964); *French Art Cleaners v. State Board of Dry Cleaners*, 40 Cal. 2d 459, 254 P.2d 42 (Cal. 1953). See also *Rice, Remedies, Enforcement Procedures and The Duality of Consumer Transaction Problems*, 48 Bos. U.L. Rev. 559, 561-63 (1965).

102. See *Goodman v. FTC*, 244 F.2d 584 (9th Cir. 1957) (falsely representing approval of Veterans Administration); *Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944) (use of words "Institute" or "Univeristy" held deceptive and an unfair method of competition where a "school" had no diploma or degree recognized by any governmental agency or any reputable college or university). Cf. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965) (deceptive practice to falsely state that products have been "certified"); *Tractor Training Service v. FTC*, 227 F.2d 420 (9th Cir. 1955).

103. 297 So. 2d at 537.

104. *Id.* at 540.

105. *Id.* The Louisiana statute is based on section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1970), and FTC case law is to be viewed as "authoritative" in questions of interpretation and construction. See *Symposium: Louisiana's New Consumer Protection Legislation*, 34 La. L. Rev. 597, 636 n.15. Under FTC jurisprudence intent to deceive is not a necessary ingredient for a "deceptive" act or practice. See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934); *Goodman v. FTC*, 244 F.2d 584 (9th Cir. 1957); *Sebrone Co. v. FTC*, 135 F.2d 676 (7th Cir. 1943).

106. 297 So. 2d 283 (La. App. 4th Cir. 1974).

goes toward the purchase price"¹⁰⁷ of the item rented, and in general gave the impression that title to the item would automatically be transferred after renting it for fifteen months, defendant's written contract, signed by plaintiffs, in fact gave them an option to purchase only for thirty days, and then only by a registered mail notice and payment of the balance of the suggested retail price, plus interest and taxes, in cash. Not only did plaintiffs fail to exercise the option in a timely manner, but their weekly rental charges were not timely made either, and pursuant to a clause in the contract purportedly so authorizing,¹⁰⁸ defendant's agents peaceably entered plaintiffs' home and repossessed the phonograph. No judicial process was utilized and the consent of neither of the plaintiffs was obtained for the entry. In affirming the trial judge's award of \$500 as damages for "a technical tort committed to their sort of family relationship, [*i.e.*] the household in general . . ."¹⁰⁹ the Fourth Circuit Court of Appeal held that defendant's attempted contractual waiver of plaintiffs' right to privacy in their home was insufficient to legitimate what otherwise would be an illegal entry into plaintiffs' home:

Public policy cannot condone the use in a sale or lease contract of a provision irrevocably authorizing entry into a debtor's or lessee's home without judicial authority or without the owner's consent at the time of entry. We decline to construe the quoted provision, incorporated into a printed form contract as a necessary condition of the agreement, as irrevocable permission to enter a private home at any time, day or night, occupied or unoccupied, under any circumstances. Law and order cannot allow such a construction, which would tend to encourage breaches of the peace.¹¹⁰

The alternative grounds available to consumers in such cases merit mention. The rental of household goods with an option to apply payments to the purchase price is essentially a consumer credit transaction¹¹¹ and thus consideration of the Federal Consumer Credit Protection Act becomes germane.¹¹² Additionally, such a purported

107. *Id.* at 286.

108. *Id.*

109. 297 So. 2d at 287.

110. *Id.* Cf. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972); *Swarb v. Lennox*, 405 U.S. 191 (1972).

111. The nature of the contract was recognized by the court when it stated, "To a person in so low an economic status that he had to obtain ownership of a phonograph by a transaction with no down payment and small weekly installments collected at his door, the contractual option was really an illusory right." 297 So. 2d at 286.

112. See note 57 *supra* and accompanying text. See also FRB Letters in 4 CCH

waiver of the right of privacy may violate the unconscionability provisions of section 3551¹¹³ of the Louisiana Consumer Credit Law, as a clause "so onerous, oppressive or one-sided that a reasonable man would not have freely given his consent [thereto]." ¹¹⁴ Finally, and to the extent defendant's advertising was calculated to give the erroneous and misleading impression that all rental payments applied to the purchase price, or that title to the item automatically transferred to renters, defendant arguably employed an "unfair or deceptive act or practice" in violation of the Louisiana Unfair Trade Practices and Consumer Protection Law,¹¹⁵ not to mention the Federal Trade Commission Act.¹¹⁶

CONS. CRED. GUIDE ¶¶ 30,039, 30,117, 30,597, 31,069 (rental-purchase agreements as "credit sales"). Cf. FRB Letter at ¶31,083. In its Annual Report to Congress on Truth in Lending for 1973, the Federal Reserve Board recommended that Congress look into the matter of consumer leases with options to purchase such goods as television sets, to the end of including such transactions in the disclosure requirements of the Truth in Lending Act. FRB Opinion letters notwithstanding, the transaction in *Fassett* arguably is within the scope of the federal law anyway, since it involved a finance charge which "is or may be imposed" under § 226.2(k) of Regulation Z [12 C.F.R. § 226.2(k) (1974)].

113. LA. R.S. 9:3551 (Supp. 1972). Cf. *Kosches v. Nichols*, 4 CCH CONS. CRED. GUIDE ¶99,186 (N.Y. Civ. Ct. 1971) (clause giving seller right to enter debtor's residence and seize goods without court order held unconscionable).

114. LA. R.S. 9:3516(29) (Supp. 1972).

115. LA. R.S. 51:1401-18 (Supp. 1972).

116. 15 U.S.C. § 45(a)(1) (1970).